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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~12-1112~~ 115

NATHANIEL BUCHANAN, *etc., et al.*,
Plaintiffs-Appellants,

v.

THE HONORABLE JAMES A. RHODES, *etc., et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION.

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STATEMENT AS TO JURISDICTION.

Pursuant to Rules 13(2) and 15 of this Court, appellants file this statement of the bases upon which the Supreme Court of the United States has jurisdiction on appeal to review the purported final judgment below dismissing plaintiffs' action and the reasons why this Court should exercise such jurisdiction in this case.

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Ohio is reported at 249 F. Supp. 860 (N. D. Ohio 1966) and is set forth in the appendix to this Jurisdictional Statement at pp. 37-46.

JURISDICTION.

This appeal is taken from a purported final judgment made by the United States District Court for the Northern District of Ohio which denied plaintiffs' motion to convene a three-judge court in accordance with 28 U. S. C. §§ 2281 and 2284, and granted defendants' motion to dismiss the action. That order was made and entered on February 2, 1966. Notice of appeal to this Court was filed in the District Court on March 3, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1253 which prescribes a right of direct appeal to this Court from an order granting or denying relief in any suit or proceeding "required by any Act of Congress to be heard and determined by a District Court of three judges."

Appellants believe that a direct appeal to this Court under the provisions of the foregoing cited statute is the appropriate remedy to review the erroneous refusal by the District Court to assemble a three-judge court and its attempt to dismiss the action without assembling such a court. At the same time, appellants should advise that they have undertaken two alternative means of review as a protective measure, in the event that this Court determines that a direct appeal is not the appropriate remedy. First, appellants are filing in this Court a petition for mandamus entitled *Nathaniel Buchanan, etc., et al., v. The Honorable James C. Connell, United States District Judge. Cf. Ex parte Bransford,* 310 U. S. 354 (1940); *Stratton v. St. Louis S. W. Ry.,* 282 U. S. 10 (1930). Second, appellants have also filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit and have obtained an order from that Court of Appeals for an indefinite extension of time to docket that appeal until this Court has determined whether to accept and retain jurisdiction of this matter.

QUESTIONS PRESENTED.

1. Whether the District Judge erred (a) in denying plaintiffs' motion to assemble a three-judge court and refusing to convene such a court in accordance with the requirements of 28 U. S. C. §§ 2281 and 2284, and (b) in purporting to exercise jurisdiction to grant a motion to dismiss this action without assembling such a three-judge court.

2. Whether plaintiffs' action for equitable relief to obtain additional judgeships for the overburdened trial court serving the greater Cleveland area presents a substantial controversy as to deprivation of rights under the Due Process and Equal Protection guarantees of the Fourteenth Amendment to the United States Constitution where the Amended Complaint and affidavit evidence before the Court assert—

(a) The consistent failure to provide a forum for civil actions for a period of four years or longer, as a denial of Due Process;

(b) The consistent and systematic assignment of judges elected by citizens of other counties to govern residents of greater Cleveland who had no part in their election, as a denial of Due Process;

(c) Gross inequality between the citizens of different Ohio counties in access to the courts, resulting from consistent gross inequalities in the time in which civil actions are reached and determined with a resulting denial of Equal Protection; and

(d) Gross inequality of apportionment of Ohio judgeships among Ohio counties from the standpoint of the populations electing and served by such judgeships, with a consequent denial of Equal Protection.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section One of the Fourteenth Amendment to the United States Constitution provides in part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Sections 1253 and 2281 of Title 28 of the United States Code provide in part as follows:

> "Section 1253. *Direct appeals from decisions of three-judge courts.* Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."
>
> "Section 2281. *Injunction against enforcement of State statute; three-judge court required.* An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the grounds of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Section Three of Article IV of the Ohio Constitution provides in part as follows:

> "One resident judge of the Court of Common Pleas and such additional resident judge or judges as may be provided by law, shall be elected in each county of

the state by the electors of such county; and as many courts or sessions of the Court of Common Pleas as are necessary, may be held at the same time in any county. Any judge of the Court of Common Pleas may temporarily preside and hold court in any county; and until the General Assembly shall make adequate provision therefor, the Chief Justice of the Supreme Court of the state * * * may assign any judge to any county to hold court therein."

Section 2301.02 of the Ohio Revised Code makes specific provision for the number of judgeships allotted to each county; the various numbers of judgeships allocated among the counties by that section are discussed in the body of this memorandum.

STATEMENT OF THE CASE.

This action is brought by 19 citizens and residents of Cuyahoga County (the County encompassing greater Cleveland, Ohio). The Amended Complaint points out that each of the plaintiffs (except those identified as minors) is also an elector and taxpayer of that county and state. Fourteen of the plaintiffs had pending civil actions for damages in the Court of Common Pleas for Cuyahoga County, which is the court of general jurisdiction provided by state law in Ohio. Five of the plaintiffs are duly licensed Ohio attorneys who regularly practice before the Common Pleas Court of Cuyahoga County. The defendants are the Governor of the State of Ohio, the Chief Justice of the Ohio Supreme Court, the Ohio Legislature through representative members of that class, and the County Commissioner for Cuyahoga County. The suit concerns the greatest single problem in the modern administration of justice—docket delay.

In substance the Amended Complaint describes a denial of Due Process and Equal Protection as a result of the Ohio constitutional provisions requiring at least one judgeship in every county and the numerical distribution of judgeships provided by the Ohio Code. For example, the Amended Complaint points out that during the year preceding the commencement of this action, Cuyahoga County and seven other urban counties were represented by and served by common pleas judges with a ratio of 75,000 or more persons for each judge, while 18 Ohio counties were represented by and served by common pleas judges at a ratio of one judge per 25,000 persons or less. Indeed one Ohio county was represented by and served by a separate common pleas judge even though its population was only 10,000 persons. The Amended Complaint and affidavit evidence before the Court further asserts gross inequality in access to the courts in part as a result of the disproportionate allocation of judgeships, with a docket waiting time in some counties of six months and a docket waiting time in Cuyahoga County of four years or more. The Amended Complaint describes each of these inequalities as a denial of Equal Protection guaranteed by the Fourteenth Amendment.

Next, the Amended Complaint refers to the unreasonable and extraordinary delay from the time a case is filed in the Cuyahoga County Common Pleas Court until it is called for trial, which has now grown to four years or longer, as a denial of Due Process. Affidavit evidence submitted by counsel for plaintiffs and defendants demonstrated a consistent and systematic procedure of assigning judges elected in other counties to serve the citizens of Cuyahoga County who had no part in their election, which constitutes another infringement of the Due Process guarantee.

The Amended Complaint seeks several forms of equitable relief, including (a) a declaratory judgment that the provisions of the Ohio Constitution and the Ohio Code which lead to the disproportionate allocation of judgeships violate the Federal Constitution, (b) a mandatory injunction directing the state legislature to provide a more appropriate allocation of judgeships, (c) a mandatory injunction directing the Chief Justice of the Supreme Court to reassign *temporarily* various Common Pleas Judges to Cuyahoga County so as to temporarily mitigate the delay and associated denial of due process, (d) a mandatory injunction directing the County Commissioners for Cuyahoga County to provide suitable and adequate courtrooms and facilities for additional judges, and (e) the exercise of continuing jurisdiction by the District Court to accomplish the purposes of this litigation.

Following the commencement of this action, the County Commissioners filed their Answer, but the other defendants filed a motion to dismiss or for summary judgment with attached affidavits. Plaintiffs filed a motion to assemble a three-judge District Court under the provisions of 28 U. S. C. §§ 2281 and 2284. Plaintiffs also filed a motion for summary judgment with affidavits attached. The District Court ignored the provisions of F. R. C. P. 12(c) by disregarding the affidavits filed by each of the parties and the cross motions for summary judgment. Instead, without even affording an oral hearing on any of the motions, the court overruled plaintiffs' motion for the convening of a three-judge court, and granted defendants' motion to dismiss the action. This appeal and the other protective measures described earlier were then instituted.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. THE MANDATORY JURISDICTIONAL REQUIREMENTS OF ASSEMBLING A THREE-JUDGE COURT.

Section 2281 of Title 28 of the United States Code makes the assembling of a three-judge District Court a mandatory jurisdictional requirement before granting or denying injunctive relief against the enforcement of any state statute on grounds that it violates the Federal Constitution. It is clear that the reference to a state statute includes a state constitutional provision. *A. F. L. v. Watson,* 327 U. S. 582 (1946). Here the action concerns the Ohio Constitution and an Ohio Statute.

In this case, the single district judge purported to deny the injunctive relief involved without assembling a three-judge court. In so doing, the district judge acknowledged that he was entirely without authority to take such action unless he could first determine that the constitutional claims were "wholly insubstantial" or "legally speaking non-existent" or "essentially fictitious," citing *Bailey v. Patterson,* 369 U. S. 31, 33 (1962). After stating those requisites, the single district judge applied a different standard by concluding that in his view "the action was patently without merit in law," and therefore he undertook to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules. We submit that the standard for determining whether a three-judge court shall be assembled is considerably different from the standard used to decide whether to dismiss a complaint under Rule 12. And, in any event, we submit that there is no basis for a decision to dismiss this Amended Complaint which does indeed state a claim upon which relief can and should be granted, as well as a substantial constitutional controversy.

This Court has made unmistakably clear the rule that a single district judge *must* assemble a three-judge court in the circumstances described by Section 2281 unless the alleged constitutional issues have recently been decided by this Court or are patently frivolous. *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U. S. 713 (1962). We submit that a review of the constitutional questions involved here indicates (a) recent decisions of this Court on legislative reapportionment cases *tend to support* the propriety of the remedy sought here, (b) there is *no* recent decision by this Court or any other controlling court which holds that judicial reapportionment is unavailable to eliminate constitutional violation, and (c) the single district judge below himself considered and weighed important constitutional considerations in deciding whether or not plaintiffs were entitled to relief. The single district judge had no power to weigh constitutional considerations. His sole authority at this stage was to decide whether any real constitutional question was presented. Cf. *Bell v. Hood,* 327 U. S. 678 (1946).

A similar lawsuit is presently pending in the United States District Court for the Eastern District of New York, entitled *Kail, et al. v. Rockefeller, et al.,* Civil No. 65-205. In that case, substantially the same relief is sought for substantially the same reasons because of the extraordinary congestion of the courts in New York City and the disproportionately low number of judgeships in that area as compared with other parts of the State of New York. The District Court there recognized its obligation to assemble a three-judge court upon a motion duly made, so that its ruling on that issue is in square conflict with the decision below. No ruling on the merits has yet been made by that three-judge court.

B. DENIAL OF DUE PROCESS.

1. Unconscionable Delay.

Anyone familiar with the practical aspects of litigation must necessarily re-echo the words of Prime Minister Gladstone:

"Justice delayed is justice denied."

While this Court has not yet had occasion to determine expressly whether persistent, extraordinary, and unreasonable delays in reaching trial in civil matters is a denial of due process, we submit that the entire fabric of Anglo-American common law establishes a constitutional guarantee for timely hearings. Where cases are delayed to permit an opportunity for further investigation or reasonable preparation, no sound criticism can be made. Where cases are delayed by the parties or their representatives, the courts and the state are not subject to criticism. But where cases are delayed far beyond the wishes of either party and far beyond any reasonable time to accommodate judicial assignments, the state has deprived its citizens and litigants of the rights associated with their lawsuits without due process of law. That deprivation results from a failure to provide the minimal essential instrumentalities for justice.

So long as the law prohibits self-help and requires the adjudication of disputes, it must provide a forum for those disputes. Failure to provide a forum constitutes deprivation of the rights associated with that litigation during the period of that deprivation. Further, to the extent that the important practical elements of proving claims and defenses are lost through passage of time, failure to provide that forum constitutes a permanent deprivation of those property rights without due process. Numerous decisions have held that the failure to provide a remedy for any sub-

stantial wrong recognized at common law is a denial of due process, unless some alternative remedy is afforded. Due process includes the preservation of a substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U. S. 326, 54 Sup. Ct. 140 (1933). The failure of the state to provide a means for adjudicating these disputes within a reasonable period of time denies the property rights of those litigants, and affords no alternative remedy.

Due process has been repeatedly interpreted to include accepted principles of procedure cognizable by Anglo-American law generally. Thus, we are warranted in looking at the guarantees of the *Magna Carta*, the cornerstone of common law jurisprudence. CAP. XXIX of *Magna Carta* reads in part:

> "We will not deny or *defer* to any man either Justice or Right."

While the explicit guarantee of a speedy trial in the Sixth Amendment of the Federal Constitution presumably relates only to criminal prosecutions, the concept of a seasonable adjudication of civil disputes is equally founded in American jurisprudence. The Ohio Constitution, for example, makes the following guarantee as part of the Ohio "Bill of Rights" at Article I, Section 16:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered *without denial or delay*."

Similar provisions can be found in numerous other state constitutions. This tradition has been so strong that it has been accepted as a standard equity maxim: "*Lex dilationes exhorret*—'the law abhors delays.' "

As early as 1897, the Federal Supreme Court recognized the critical involvement of time as an element of justice. In *Forsyth v. Hammond*, 166 U. S. 506 (1897), the Court considered the extent of its certiorari power and appropriate limitations on its use. The Court pointed out at page 513 that over-use:

> "* * * would simply prevent that *promptness of justice which in all juridical actions is one of the elements of justice.*" (Emphasis added.)

More recently the same language was quoted with approval when the Court refused to defer adjudication of a matter to the state court system. See *Allegheny County v. Frank Mashuda Co.*, 360 U. S. 185, 196-97 (1959). A similar view was expressed by the Court of Appeals for the Tenth Circuit in *Sweeney v. Anderson*, 129 F. 2d 756 (10th Cir. 1942). Approving the dismissal of an action for want of prosecution, the Court said at page 758:

> "The elimination of delay in the trial of cases and the prompt dispatch of court business are *prerequisites to the proper administration of justice.*" (Emphasis added.)

Numerous state court decisions have applied federal or state constitutional provisions to hold that the administration of justice without delay is constitutionally guaranteed. E.g., *Johnson v. Diefendorf*, 56 Idaho 620, 57 P. 2d 1068 (1936) (statute unconstitutional as preventing speedy adjudication of sales tax disputes); *State ex rel. Carlin v. District Court*, 164 P. 2d 155 (1946) (inconvenience to jurors cannot justify denial of constitutional right to speedy trial); *Campbell v. Hulett*, 243 S. W. 2d 608 (Ky. 1951) (unreasonable postponements deny constitutional right to trial without delays); *Commonwealth ex rel. Tinder v. Werner*, 280 S. W. 2d 214 (Ky. 1955)

(statute allowing party to defer trial for two years is unconstitutional as denying justice without delay); *Evansville v. Baumeyer*, 199 N. E. 2d 472 (Ind. 1964) (abuse of venue changes denies constitutional guarantee that justice be administered speedily and without delay); *Catlett v. State*, 336 S. W. 2d 8 (Tenn. 1960) (statute preventing eminent domain trial until six months after completion of roadway or twenty-four months after suit violates constitutional guarantee of justice without delay); *State v. Taylor*, 137 N. E. 2d 537 (Ind. 1956) (speedy administration of justice applies to civil as well as criminal cases); *Sullivan v. Storz*, 156 Nebr. 177, 55 N. W. 2d 499 (1952); *Royall v. Peters*, 180 Va. 178, 21 S. E. 2d 782 (1942); *Sherwood v. Lohman*, 184 Va. 511, 35 S. E. 2d 757 (1945); *Commonwealth ex rel. Duff v. Keenan*, 347 Pa. 574, 33 A. 2d 244 (1943); *Armstrong v. Duffy*, 90 Ohio App. 233, 103 N. E. 2d 760 (1951).

The evidence before the District Court on motions for summary judgment included the affidavit of an active trial practitioner in the community and the admissions of the defendants in response to plaintiffs' requests for admissions (the defendant County Commissioners are deemed to have admitted every request for admission by reason of their failure to answer those requests). This evidence establishes without dispute or contradiction that trials in Cuyahoga County are not reached for approximately four years after the date of filing. Whatever the status of the trials in other counties in Ohio, this situation in Cuyahoga County is intolerable and a denial of the constitutional rights of the citizens and litigants in that County. While the District Court must exercise some care in fashioning a remedy for this constitutional violation, we believe that an important part of that remedy is the substantial increase in judges supplied by the State of Ohio

whether they are taken from other counties or simply added to the available judges now sitting in the Cuyahoga County Common Pleas Court. To that extent, relief against the state officials and the County Commissioners is essential.

2. Judicial Government Without the Consent of the Governed.

In full recognition of the unconscionable delay which faces litigants in Cuyahoga County, state officials have attempted unsuccessfully to mitigate that problem. In an affidavit to the District Court by Kingsley Taft, Chief Justice of the Ohio Supreme Court, he states:

> "That he has been assigning and will continue to assign, two Common Pleas judges from other counties to the Common Pleas Court of Cuyahoga County for the purpose of relieving docket congestion in that Court."

His affidavit further states:

> "That he has been, and continues to be, willing to assign a greater number of Common Pleas judges from other counties to the Common Pleas Court for Cuyahoga County if additional requests are made."

Thus, the state has embarked upon a persistent and systematic program of judicial reassignments to meet apparently acknowledged deficiencies in judicial apportionment. While the motives involved are commendable, the method is intolerable, except as a stop-gap temporary procedure while reapportionment is accomplished. This method denies the very foundations of a democratic society.

The Declaration of Independence announced the basic precept of government:

> "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed * * *."

Under Ohio's established program, the citizens of remote counties regularly elect judges who will govern citizens of Cuyahoga County. The Cuyahoga County elector has no part whatever in the selection of these out-of-county judges, directly or indirectly.

The recent decisions by this Court concerning legislative reapportionment established firmly that one citizen should have no greater voting power than another, and that each citizen should have an equal right to select those who govern. Under the Ohio reassignment technique, Cuyahoga County citizens are deprived of any right to select part of the judiciary who have and will regularly govern them. Instead, they are obliged to accept judges elected by different segments of the Ohio population whose interests, standards, and purposes may differ markedly from their own.

We submit that such a program is a denial of Due Process, or a denial of Equal Protection, in its most elementary sense.

C. DENIAL OF EQUAL PROTECTION.

The decisions in the various legislative reapportionment cases have iterated the constitutional requirement that each citizen have an equal voice in selecting those who will make his laws. Thus, in *Westberry v. Sanders*, 376 U. S. 1 (1964), this Court said at 376 U. S. 17:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

In *Reynolds v. Sims,* 377 U. S. 533 (1964), the majority opinion states at 377 U. S. 555:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

And at 377 U. S. 562, the Court continues:

> "It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or ten times for their legislative representatives, while voters living elsewhere could vote only once."

And at 377 U. S. 566:

> "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race (citation omitted), or economic status (citation omitted)."

With respect to the significance of county boundaries, the Court said in the *Reynolds* case at 377 U. S. 575:

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of the state governmental functions."

Thus, rejecting the alleged analogy to the structure of the federal government, the court held in that case that both houses of a bicameral legislature must be elected on the basis of population.

With reference to the contention that every county or similar population unit must necessarily have a representative, regardless of its total population, the Court said at 377 U. S. 581:

> "However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many states, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a state where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible."

The most direct parallel to the Ohio apportionment of Common Pleas judges is the Ohio apportionment of legislators, since in both instances the Ohio Constitution requires that each county be represented by at least one common pleas judge and at least one representative to the General Assembly. And, of course, in *Nolan v. Rhodes*,

378 U. S. 556 (1964), this Court summarily declared that Ohio's apportionment was unconstitutional and remanded the case to the Southern District Court of Ohio for further proceedings. In light of that unmistakable body of decisions by this Court, there remain only two questions in determining whether the Equal Protection guarantee is violated by the apportionment of Ohio judges: (1) Does the election of common pleas judges involve the same selection of governing officials or representatives as the election of legislators, and (2) is there in fact a gross disproportion among the population county units in the judgeships allocated to them?

With respect to the first question, we submit that the parallel between judgeships and legislators is constitutionally impelling and necessary. Each of these elected officials participates in the creation of laws which affect citizens of the State generally, including those beyond county boundaries. It is not mere jurisprudential conjecture to state that courts make law. In virtually every judicial decision, law of one form or another is being made and decided. To the extent that the law is composed of interpretations of statutes, constructions of state and federal constitutions, and the development of the common law, *the courts and only the courts make those laws.* The laws that are made by a Common Pleas Court are not ordinarily intended to apply only to the citizens of that particular county. Rather, they are intended to describe the law of Ohio generally. They are accepted as precedent and presumptively authoritative by the Common Pleas Courts in other counties.

Further, any Ohio citizen who seeks to enforce his Ohio legal remedies in a Common Pleas Court outside his own county is necessarily subjected to the determinations of a judge of that other county. Because of various Ohio

venue provisions, a resident of one Ohio county may well be obliged to enforce or defend his Ohio legal rights in a different Ohio county. E.g., Ohio Rev. Code, §§ 2307.32, 2307.33, 2307.34, 2307.35, 2307.36, 2307.37, 2307.38, 2307.39, 2703.04.

Thus, the parallel between members of the common pleas bench and the legislature is a close one for these purposes. Other courts have already noted the applicability of the recent reapportionment decisions to officials other than state legislators. E.g., *State ex rel. Sonneborn v. Sylvester,* 132 N. W. 2d 249 (Wis. Sup. Ct. 1965). If the Constitution prohibits the citizen of one county from having a greater voice than the citizen of another county in selecting an official who creates law for the citizens of both counties, the Constitution must certainly prohibit the citizen of one county from having a disproportionate voice in selecting judges who make law for all counties. The fact that a judge of the Court of Common Pleas is an official of the State of Ohio who is deciding the law of Ohio generally, is emphasized by the constitutional provisions creating that court for the entire state and authorizing its regulation by the State Legislature. See Constitution of the State of Ohio, Article IV, Sections 1, 3, 4, 12, 13, 14, 17, 18 and 20.

Second, it is appropriate to determine whether there is in fact a gross disproportion on a population basis of the judgeships allocated to the various counties. In making that analysis, we should keep in mind that the Ohio Constitution requires the legislature to provide at least one common pleas judge in every county, regardless of population. The following tabular summary demonstrates some of the more extreme examples of disproportionate judicial representation in 1965:

County	Population in Thousands:	Common Pleas Judges:	Population in Thousands per Common Pleas Judges:
CUYAHOGA	1,648	23	72
HAMILTON	864	13	66
MONTGOMERY	527	8	66
LUCAS	457	7	65
TRUMBULL	209	4	52
LAKE	149	3	50
HENRY	25	1	25
BROWN	25	1	25
FAYETTE	25	1	25
UNION	23	1	23
MEIGS	22	1	22
WYANDOT	22	1	22
HOLMES	22	1	22
CARROLL	21	1	21
HOCKING	20	1	20
ADAMS	20	1	20
MORROW	19	1	19
PIKE	19	1	19
HARRISON	18	1	18
PAULDING	17	1	17
MONROE	15	1	15
MORGAN	13	1	13
NOBLE	11	1	11
VINTON	10	1	10

This data was based on the 1960 Federal Census and the statutory number of common pleas judges for each of the counties during 1965. It has been admitted by the defendants in response to plaintiffs' Requests for Admissions. Because of recent legislation adding one additional judge for certain of these counties (Amend. Subst. H. Bill 165), the population in thousands for each common pleas judge has changed slightly for 1966 to the following ratios, assuming that the population remains the same as it was in 1960:

CUYAHOGA	69	HARRISON	18
MONTGOMERY	66	PAULDING	17
LUCAS	65	MONROE	15
HAMILTON	62	MORGAN	13
TRUMBULL	52	NOBLE	11
LAKE	50	VINTON	10

Although this indicates some improvement, assuming that the population of these more urban counties has not increased whatever since 1960, there is still a gross disproportion. Cuyahoga County has approximately one-

seventh (1/7) the number of judges for its population as Vinton County. This is not an equal protection of the laws. However, it is a well accepted demographic fact that urban populations have been increasing while rural populations have been constant or decreasing. Thus, the actual disproportion is even greater than is indicated by the 1960 census data.

Finally, from a different viewpoint, Equal Protection is not being afforded to the citizens of Cuyahoga County and other urban counties. To this point, we have discussed Equal Protection in terms of equal right to elect those who make the laws. However, equal protection also involves equal access to the courts and an equal opportunity to have disputes resolved seasonably. *Old Colony R.R. v. Assessors,* 309 Mass. 439, 35 N. E. 2d 246 (1949); *Sexton v. Barry,* 233 F. 2d 220 (6th Cir. 1956), cert. den. 352 U. S. 870. As the affidavits indicate in this case, the time for a case to reach trial after it is filed is at least four times as long (and maybe as much as eight times as long) in urban counties like Cuyahoga County as it is in many rural counties. Thus, the citizens, litigants, lawyers, and residents of this county are being denied equal access to the courts. This is another invidious discrimination which violates the guarantees of the Fourteenth Amendment.

D. THE DISTRICT COURT'S REFUSAL TO PROTECT CONSTITUTIONAL GUARANTEES.

The single judge District Court rejected the foregoing grounds for relief. His opinion, which is set forth in full in the appendix at pp. 37-46, asserts three reasons for his action: (a) a lack of judges is not the only factor causing a delay, (b) the allocation of judgeships is a political question which must be solved by political measures, and (c) there is rational justification for insistence on at least one

judge in each county regardless of the effect of such an apportionment.

Considering first the significance of inadequate judgeships, we note that the District Court purported to take judicial notice of studies and surveys as to the cause of docket delays. The Court does not cite any of the surveys upon which he purportedly relies, but numerous analyses have shown the direct relationship between judicial shortages and docket delay. See, e.g. Burger, *The Court on Trial: A Call for Action Against Delay,* 44 *A. B. A. J.* 738, at 798 (1958); Warren, *The Problem of Delay: A Task for Bench and Bar Alike,* 44 *A. B. A. J.* 1043 at 1046 (1948); Hinshaw, *Backlog of Cases: A Compromise Solution,* 48 *Ill. B. J.* 195 (1959); Wright, *The Overloaded Fifth Circuit; A Crisis in Judicial Administration,* 42 *Tex. L. Rev.* 949 (1964); Santo, *The Law Explosion and The Denver District Court, J. A. Jud. Soc.* 220, at 221 (April 1965); *Project Effective Justice, J. A. Jud. Soc.* 93, at 99-100 (Oct. 1964).

The most commonly accepted analysis of proposals to alleviate judicial delay is perhaps Zeisel, Kalven, Buchholz, *Delay in the Courts* (1959). In that treatise the authors say at p. 206:

> "We come at last to the ultimate remedy for court delay, the addition of more judges."

And at p. 207:

> "Finally, more judges are an ultimate remedy in the simple sense that they are the one remedy for delay that is certain to work."

This is not to say that the lack of sufficient judges is the only source of delay. The single judge District Court pointed to an inadequate supply of qualified trial lawyers, the failure of the Court to conduct trials during the summer months in a non-air-conditioned courthouse, and

other possible factors. We do insist, however, that the inadequate number of judges in Cuyahoga County is a major contributing factor for the docket delay, and a factor which the Court has power to remedy. Indeed, an extremely heavy criminal and domestic relations docket as well as other factors beyond the control of the Common Pleas Court, have resulted this year in having only six judges available to attack the 12,000 case backlog and the 12,000 new filings annually in ordinary civil matters.

The district judge attempted to deal lightly with the grave constitutional problems presented by asking rhetorically why the plaintiffs do not also seek a reapportionment of sheriffs, clerks, trial lawyers, and courthouses. The simplest response is the fact that there has been no need shown for any reapportionment of such other factors. If there were a need for reapportionment of *state officials* to provide the minimal needs of justice, then the District Court might well consider whether to require the legislature to provide minimal personnel to guarantee Due Process and Equal Protection. In a manner similarly designed to deal lightly with these issues, the district judge suggests that there may well be no prejudice whatever to litigants who are forced to attend long delays of four years before their cases are heard. Such a statement is both unacceptable and beyond understanding to any lawyer actively engaged in a litigation practice.

The second basis for the District Court's action is the concern by the single judge that the issues are political questions which should be solved by political means. Citing the language of *Baker v. Carr*, 369 U. S. 185, at 217 (1962), the trial judge concluded that the apportionment of judges is a "political question" because the policy determination necessary to an allocation of judges depends upon the exercise of non-judicial discretion without ju-

dicially discoverable or manageable standards. Plainly, an apportionment on a population basis is a judicially discoverable and manageable standard. Plainly, a provision for enough judges to prevent a four year docket delay is a judicially discoverable and manageable standard. Plainly, the insistence that the required judges be elected by the people whom they govern, if they are to be elected at all, is a judicially discoverable and manageable standard. We submit that the single district judge presumed to decide otherwise, without even submitting his questionable position to the determination of a three-judge court.

The defendants attempted to argue in the trial court that the issue involved is a "political question" because there is a theoretically potential political remedy. They claimed that the legislature could conceivably ameliorate this situation although it has failed to do so in the past. However, in *Davis v. Mann,* 377 U. S. 678 (1964), the majority indicated that the potentiality of subsequent action by the Legislature should not terminate the court's jurisdiction and authority over the mal-apportionment (377 U. S. at 692-93):

> "We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time. Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election. After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme."

See also *Reynolds v. Sims,* 377 U. S. 533, at 585-87 (1964).

Perhaps the best demonstration of the lack of substance to defendants' contentions that the matter must be left to political determinations was the decision in *Lucas v. 44th General Assembly of Colorado*, 377 U. S. 713 (1964). In that case the people of the state had approved a new apportionment plan by general referendum. Nevertheless, this Court held that the new apportionment plan was constitutionally invalid. The results of that referendum showed that a majority of the population of the state and a majority of the population in every county had approved the apportionment scheme. In direct conflict with the defendants' contention that only a political remedy is available if a political remedy is potentially possible, this Court said in the *Lucas* case (377 U. S. 736-37):

> "Except as an interim remedial procedure, justifying a court in staying its hand temporarily, we find no significance in the fact that a non-judicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. Courts sit to adjudicate controversies involving alleged denials of constitutional rights. * * * We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause as delineated in our opinion in *Reynolds v. Sims*. And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily where recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election."

See also *Maryland Committee for Fair Representation v. Tawes*, 377 U. S. 656 at 675-76 (1964); *WMCA, Inc. v.*

Lomenzo, 377 U. S. 633 at 654-55 (1964); *Roman v. Sincock*, 377 U. S. 695 (1964); *Fortson v. Toombs*, 379 U. S. 621 (1965).

Defendants' trial memorandum relied upon "the promise of legislative reapportionment in Ohio" and "the hope that a new state legislature will be more fully responsive to the electorate whom they serve and represent." These *promises* and *hopes* are salutary but in no sense dispositive. As indicated by the decisions discussed above, this Court should act to declare unconstitutional the present apportionment of Ohio common pleas judges. Defendants' arguments go only to the manner in which the District Court would fashion a remedy after declaring the plaintiffs' rights. In other words, this contention would have application only to a determination whether the District Court should delay various parts of the injunctive relief necessary, to afford an opportunity to some future legislature to begin steps for a constitutional amendment so that some other legislature even further in the future could take appropriate action to relieve the judicial malapportionment.

Indeed, one of the reasons that plaintiffs have not sought to press the present litigation during the pendency of the past Ohio legislative term was to afford an opportunity for some legislative correction, in a matter consistent with the previous directives of this Court when legislative action could be imminent. We have seen that none of the necessary legislative action has occurred, despite the existing judicial decisions on legislative reapportionment and despite the existence of this lawsuit against the members of the legislature itself. Thus, defendants attached to their Motion for Summary Judgment the affidavits of Representative James P. Celebrezze and Senator David T. Matia who respectively introduced bills for ju-

dicial reapportionment on a population basis and for an additional six judges for the Common Pleas Court of Cuyahoga County. After that legislative session had terminated, we noted that neither of these bills had made any progress whatever. Indeed, the total action by the legislature in facing this problem consisted of one additional judgeship in each of five (5) selected counties. The single additional judgeship for Cuyahoga County does not even begin to eliminate the gross discrimination on a population basis.

In substance, the district judge's position is that the courts should grant no remedy whatever since there may *someday* be *some* legislative action which *could conceivably* ameliorate the situation. Plaintiffs and the citizens of Cuyahoga and other urban Ohio counties are not obliged to wait interminably for such theoretical legislative deliverance. The courts can and should declare the Ohio constitutional provision and the Ohio statute establishing the present apportionment of common pleas judges as violative of the Federal Constitution. After making that declaration, the District Court can and should take express affirmative action to insist that the legislature itself remedy the situation and to insure that proper action is taken only if the legislature defaults on its responsibility.

Finally, the district judge suggested that strong policy considerations militate toward retaining at least one Common Pleas judge in each county. He concluded, therefore, that reapportionment was inappropriate. It should be remembered that virtually the same arguments were made in the legislative apportionment cases where counsel argued vigorously that each area must have a legislator who is accessible and responsive to the needs of the individual communities. We submit that the argument has no greater validity here than it did in the legis-

lative apportionment cases. There is no compelling need to station one Common Pleas judgeship in every county regardless of its size or population. It would not be difficult for the District Court to fashion a reapportionment plan by which one Common Pleas judge served two or more adjacent counties without causing any undue hardship to the citizens of any of the counties. Under modern transportation circumstances, such a judge could be readily accessible within one hour's driving time while serving several counties. Indeed, a Common Pleas judge assigned to more than one county could feasibly accomplish his duties in the various counties by periodic appearance at the courthouse in each of the counties served. His commuting time would probably be less than the commuting time of Common Pleas judges in urban counties who travel from their suburban residences to the downtown courthouses.

The concept that a common pleas judge can adequately serve a territory greater than the geographical limits of a single county is certainly not a new one. Indeed, Ohio trial judges did ride circuit over several counties at a time when they were forced to employ far inferior transportation and communication methods, prior to the adoption of the latest Ohio Constitution in 1913. Insistence that there must be a judgeship assigned to each county is a matter of form rather than substance, since the individual judge holding that post may well be outside the county on vacations, business trips, and other activities. In rural counties of Ohio, the common pleas judge often has substantial time available after completing his judicial duties to conduct another business or profession which entails considerable time away from the courthouse. Many of the judges in rural sections are periodically reassigned by the Chief Justice of the Ohio Supreme

Court to urban communities where they can help to fight the growing backlog. At those times they are totally inaccessible to the citizens of their own counties for periods of weeks or months. We submit that these same judges would be more readily accessible if the work load derived from a larger population were sufficient to occupy their time fully, so that they would remain within the same general geographical area on judicial business at all times. Thus, reapportionment would likely make the judges more accessible for more of the time in rural areas.

CONCLUSION.

The problem of docket delay in the major metropolitan areas threatens to shake the very foundations of our nation's judicial system. That problem is attributable in large part to the inadequate number of judgeships provided by the state legislatures for the large urban areas. The citizens of the urban communities are thereby denied Equal Protection and Due Process guaranteed by the Fourteenth Amendment. This Court can and should review the abbreviated determination by the single judge District Court and should remand this case for further consideration by a three-judge District Court with instructions.

Respectfully submitted,

RICHARD M. MARKUS,
1400 Leader Building,
Cleveland, Ohio 44114,
Counsel for Appellant.

APPENDIX.

AMENDED COMPLAINT FILED IN THE DISTRICT COURT.

No. C 65-159.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

NATHANIEL BUCHANAN, *etc., et al.,*

Plaintiffs,

vs.

THE HONORABLE JAMES A. RHODES, *etc., et al.,*

Defendants.

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1. This Court has jurisdiction of the subject matter of this action by reason of the provisions of the United States Constitution, Amendment XIV, Section 1, and the provisions of 28 U. S. C. 1331(a), 1343(3), 1357, 2201, and 42 U. S. C. 1983 and 1988. The amount in controversy herein exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

2. Plaintiffs are all residents and citizens of Cuyahoga County, Ohio. All plaintiffs, except those identified as minors, are also electors and taxpayers of Ohio. Plaintiffs Nathaniel Buchanan, Gdn., Mary Janda, Joseph Kondek, Joseph Makransky, Katheline McCabe, Patricia McClanahan, Carla Merlini, Robert Nagle, Mary Stack, Vergil Tweed, Madlyn Verhage, Marion Vinocur, and Elsie Thomas presently have pending civil actions for damages in the Court of Common Pleas for Cuyahoga County as parties plaintiff. Plaintiffs David I. Sindell, Joseph M. Sindell, Philip J. Bourne, Curt E. Stern, and Keith E. Spero are all members of the Bar of the State of Ohio in

good standing and are actively engaged in the practice of law in the courts of Ohio, including particularly the Court of Common Pleas for Cuyahoga County. Each of the plaintiffs brings this action on behalf of himself and all other persons in his identified class (i.e., "residents and citizens of Cuyahoga County," "electors and taxpayers of Cuyahoga County," and "attorneys engaged in the practice of law in Cuyahoga County"). The above named members of the Ohio Senate and the Ohio House of Representatives are named in their representative capacities and as members of the classes of persons who are members of those two governmental bodies. With respect to each of the classes of persons named above, the representative defendants are acting in accordance with Rule 23 of the Federal Rules of Civil Procedure since the number of persons in each such class is so numerous that it is impracticable to bring all members of such class before the court, the named representatives of each such class will fairly insure the adequate representation of the entire class, the rights sought to be enforced are common to each member of each class and several to each member of each class, and there are common questions of law and fact affecting the several rights and common relief sought with respect to each member of each class.

3. Under the provisions of the Ohio Constitution, the court of common pleas is the trial court of general jurisdiction for the hearing of civil and criminal matters. Article IV, Section 3 of the Ohio Constitution provides that there shall be one judge of the common pleas court who is resident in and regularly assigned to each of Ohio's eighty-eight (88) counties. The Ohio legislature, consisting of the Ohio Senate and the Ohio House of Representatives, has enacted Ohio Revised Code Section 2301.02, which designates the numbers of common pleas

judges assigned to regularly hear cases in the various Ohio counties.

4. By reason of the provisions of the Ohio Constitution, Article IV, Section 3, and the provisions of Ohio Revised Code Section 2301.02, in 1964 eighteen (18) Ohio counties were represented by and served by common pleas judges at a ratio of one judge for each 25,000 persons or less (Henry Co., Brown Co., Fayette Co., Union Co., Meigs Co., Wyandot Co., Holmes Co., Carroll Co., Hocking Co., Adams Co., Morrow Co., Pike Co., Harrison Co., Paulding Co., Monroe Co., Morgan Co., Noble Co., and Vinton Co.). At the same time, during the calendar year of 1964, Cuyahoga County and seven (7) other counties were represented by and served by common pleas judges with the ratio of 75,000 or more persons for each such judge (Cuyahoga Co., Hamilton Co., Montgomery Co., Lucas Co., Licking Co., Clermont Co., Muskingum Co., and Wayne Co.).

5. By reason of changes made in the Ohio Revised Code Section 2301.02, slight changes were made for 1965 in the numbers of common pleas judges assigned to and provided for Cuyahoga County and five other counties from those enumerated above: Hamilton Co., Montgomery Co., Lucas Co., Licking Co., and Clermont Co. However, there still remains a gross inequality of representation for the citizens, residents, taxpayers, litigants, and electors of Cuyahoga County (including particularly these plaintiffs) in comparison with the eighteen (18) enumerated counties listed above having 25,000 or less persons per common pleas judge. The ratio of population represented per judge in Cuyahoga County as compared with those eighteen (18) counties is approximately three to one, so that each citizen of Cuyahoga County has approximately

one-third (⅓) of the representation on the Ohio common pleas bench as the citizens of those enumerated eighteen counties. The representation by common pleas judges for citizens of Cuyahoga County is likewise grossly disproportionate as compared with numerous other counties of the State of Ohio. By reason of this gross disproportion in representation, the plaintiffs have been denied the equal protection of Ohio laws as residents, citizens, taxpayers, and electors of Cuyahoga County.

6. As a result of the long standing nature of this gross disproportion in representation, the judges of the Court of Common Pleas sitting in Cuyahoga County have been unable to maintain a current docket. There were outstanding at the end of the calendar year 1964, 17,350 cases on the docket of the Court of Common Pleas for this county. The metropolitan nature of Cuyahoga County has caused an even greater case load upon the Common Pleas Court for this county in proportion to the case loads of less urban counties. During the calendar year 1964, more than 800 new cases were filed for each judge assigned to Cuyahoga County and to the judges in twelve (12) other counties, while less than 300 cases were filed for each common pleas judge in thirty (30) Ohio counties.

7. As a result of these and other circumstances, the average delay in the time for the hearing of an ordinary civil action for damages, from the date of filing of such action to the date of trial, is now approximately four (4) years in Cuyahoga County, while the delay in hearing such cases in numerous other counties averages less than one (1) year. Similar unreasonable and disproportionate delays are suffered in the Cuyahoga County Common Pleas Court in criminal matters and other civil matters. Consequently, the plaintiffs are being denied equal protection of

Ohio laws as compared with similar persons in other counties and are being denied their rights without due process of law by reason of the extraordinary and unreasonable delay in the hearing of such matters.

8. The plaintiffs are now suffering irreparable damages by reason of the continued violation of their rights under the United States Constitution as set forth above.

9. The Honorable Kingsley A. Taft is the duly elected and acting Chief Justice of the Ohio Supreme Court. By reason of Article IV, Section 3 of the Ohio Constitution, the Chief Justice of the Ohio Supreme Court has the power to assign any judge of an Ohio common pleas court to hold court in any other county on a temporary basis.

10. The Ohio Senate is brought into this action on a representative basis by defendants Anthony O. Calabrese, John J. Corrigan, and David T. Matia. The Ohio House of Representatives is brought into this action on a representative basis by defendants Anthony O. Calabrese, Jr., James P. Celebrezze and John F. Corrigan. Each of these named representative defendants is a duly elected and acting member of the respective legislative body. Under the provisions of Article IV, Section 3 of the Ohio Constitution, the legislature of Ohio has the power to enact laws which will create the positions of common pleas judge and to allocate such positions among the several counties of Ohio.

11. The defendants Frank M. Gorman, Henry W. Speeth, and William P. Day are named in their official capacity as County Commissioners for Cuyahoga County, Ohio, to which positions they were duly elected and in which position they are now serving. Sections 307.01 and 307.02 of the Ohio Revised Code require the County Commissioners to provide a courthouse, courtrooms, and ap-

propriate furnishings, equipment, and facilities for common pleas judges sitting and acting within their respective counties.

12. The Honorable James A. Rhodes is the duly elected and acting Governor of the State of Ohio and the chief executive of Ohio in the enforcement of the Constitution and the laws of the State of Ohio.

WHEREFORE, plaintiffs pray judgment as follows:

(a) That this Court declare that the provisions of the Ohio Constitution, Article IV, Section 3 which require at least one common pleas judge for each Ohio county are in violation and contravention of the United States Constitution, Amendment XIV, Section 1.

(b) That this Court declare that the provisions of Ohio Revised Code, Section 2301.02 which allocate and apportion judges of the courts of common pleas among the several counties of Ohio are in violation and contravention of the United States Constitution, Amendment XIV, Section 1.

(c) That this Court order and direct by mandatory injunction that the Ohio Senate and the Ohio House of Representatives establish a new plan for reapportionment of the Ohio common pleas judges so as to more nearly provide an equal protection of the laws to the plaintiffs and other persons in the same or similar circumstances and so as to prevent the continued deprivation of the property rights without due process of law of the plaintiffs and other persons similarly situated by reason of extraordinary and unreasonable delays in the adjudication of cases in the common pleas courts.

(d) That this Court order and direct the Chief Justice of the Ohio Supreme Court by mandatory injunction to reassign temporarily the various common pleas judges to

Cuyahoga County and other counties similarly situated so as to provide more nearly an equal protection of the laws to the plaintiffs and persons similarly situated and so as to provide a more speedy adjudication of cases for Cuyahoga County and other counties similarly situated, until such time as permanent reapportionment is accomplished.

(e) That, in the alternative, if the Chief Justice of the Ohio Supreme Court fails to adopt a suitable program of reassignment following order by this Court, that this Court shall itself approve and order into effect a program of reassignment of common pleas judges on a temporary basis. And, if the Ohio legislature fails to adopt and enact a permanent program of reapportionment and reassignment of Ohio common pleas judges following an order by this Court, that this Court shall approve and enforce such a program of permanent reapportionment and reassignment of Ohio common pleas judges.

(f) That this Court order the County Commissioners for Cuyahoga County to provide suitable and adequate courtrooms, equipment, and facilities for such additional judges as shall be necessary to accomplish the above described purposes.

(g) That this Court grant temporary relief during the pendency of this action in accordance with Rule 65 of the Federal Rules of Civil Procedure.

(h) For such other legal and equitable relief as this Court shall deem just and appropriate.

RICHARD M. MARKUS,
Attorney for the Plaintiffs.

RE: PLAINTIFFS' APPLICATION FOR THE CONVENTION OF A 3-JUDGE COURT AND DEFENDANTS' MOTION TO DISMISS.

(Filed February 2, 1966.)

CONNELL, *C. J:*

The plaintiffs are litigants involved in personal injury lawsuits filed in the Court of Common Pleas, Cuyahoga County, Ohio. Their Complaint alleges that constitutional and statutory provisions establishing the judicial structure in Ohio, whereby each county is guaranteed at least one judge in the court of general jurisdiction (the court of common pleas), operate to deprive the plaintiffs of equal treatment under the law. They aver that the counties encompassing urban areas with larger populations, in particular Cuyahoga County, have fewer judges per population unit and that the disproportionate number of judges operates to their prejudice by causing them to wait longer for the completion of their litigation than litigants in smaller counties.

The genesis of this suit is the United States Supreme Court's dramatic reapportionment cases which require that the number of representatives returned to legislative bodies from political subdivisions within the state must be apportioned among the state's political subdivisions in relation to the population of said subdivisions. Our attention is especially directed to *Nolan v. Rhodes,* 378 U. S. 556 (1964), which struck down that provision of the Ohio Constitution which required that each county in Ohio have one representative in State House of Representatives. Plaintiffs here claim that as litigants in a heavily populated county, with one judge per 75,000 people, they are forced

to endure a waiting period of some three or four years[1] while litigants in a smaller county may have a waiting period of perhaps one year, perhaps two years. Implicit in their demands here is the somewhat questionable premise that the *sole*[2] cause of this delay is the insufficient number of judges in larger counties and that the panacea for delay is an increase in that number to be effected by the apportionment of judges solely upon the basis of population within the jurisdiction which each judge serves. The plaintiffs claim that the presence of one common pleas judge sitting in Vinton County, with its population of 10,000 people, secures for litigants in Vinton County a preferential treatment under color of law and deprives litigants in Cuyahoga County of an equal opportunity for speedy justice. We are asked to recognize a federal constitutional mandate, imbedded in the Equal Protection Clause of the Fourteenth Amendment, which forbids the operation of such a judicial system, and we are asked to

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[1] The plaintiffs would have us presume that a three to four year delay is necessarily prejudicial in every case. There are provisions which permit the advancement on the docket of cases in which one or the other party can show possible prejudice by delay (*Cf.* Common Pleas Court Rule 16); the plaintiffs would have us presume that these measures are necessarily ineffective and that, despite their availability, all plaintiffs who must wait three to four years for justice are necessarily prejudiced.

[2] We can take judicial notice of the many studies and surveys which have been made in urban areas which have attempted to expose the causes of docket backlog and to suggest some possible remedies. While the number of judges serving in each county is necessarily a significant factor, it is not the only one. We can take judicial notice of a dearth of qualified trial lawyers. We are well aware of the reluctance of the members of the bar to work through the summer months. We can take judicial notice of the weather which makes Cuyahoga County Common Pleas Court an uncomfortable oven during the summer months, thus rendering the building unusable for jury trials. It is therefore quite obvious that the number of jurists within the county is not the *sole* factor occasioning delay.

convene a three-judge court to enjoin the further operation of that judicial system.

We are surprised that the plaintiffs would have us reapportion only the judges in the trial courts of the state. Should we not also reapportion the number of sheriffs and their deputies so that litigants in heavily populated counties will have an opportunity to secure quicker service of process? Should we not also reapportion the number of clerks of court and their deputies so that litigants in heavily populated counties will have more expeditious processing of the paper work involved in litigation? Since the prejudicial delay is also caused by a paucity of trial lawyers, shall we, considering lawyers as officers of the court (to satisfy the "state action" requirement for invoking the Fourteenth Amendment), reapportion their number among the eighty-eight counties of Ohio? And if this Court can affect the destinies of men by amending an entire judicial structure, what of mere brick and mortar? Should we not also reapportion the number of courthouses and courtrooms in the various counties? [3] These questions supply their own answers.

The plaintiffs thus would plunge us headlong into that thicket of explosive political questions against which Mr. Justice Frankfurter so wisely warned us in *Colgrove v. Green*, 328 U. S. 549 (1946).

This case is presently before us for the consideration of two motions: the plaintiffs' application for the convention of a three-judge court and defendants' motion to dismiss. Ordinarily, it is neither the function nor the prerogative of the district judge to whom is addressed an application for a three-judge court under 28 U. S. C.

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[3] This is a question of great practical necessity in the instant lawsuit because there are no empty courtrooms in the Cuyahoga County Courthouse.

§ 2281,[4] to consider the merits of the plaintiffs' alleged grievance.

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp. v. Epstein,* 370 U. S. 713, 715 (1962).

Where the allegations of the complaint, taken as true, fashion a grievance of constitutional proportions brought about by the operation of a state statute, § 2281 requires that the district court convene a three-judge panel. However, that section is inapplicable—

> * * * when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. * * * The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply. The three-judge requirement is a technical one to be narrowly construed, *Phillips v. United States,* 312 U. S. 246, 251. The statute comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a statute. There is no such

---

[4] § 2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

> ground when the constitutional issue presented is essentially fictitious. *Bailey v. Patterson,* 369 U. S. 31, 33 (1962).

Thus, when a complaint is patently without merit in law, as is the plaintiffs' here, a single district judge is empowered, as he is in every civil case, to dismiss the complaint for "failure to state a claim upon which relief can be granted." Rule 12(b)(6) Federal Rules of Civil Procedure.

The judicial system of the State of Ohio originates in the Ohio Constitution, specifically Article IV, where it is provided, *inter alia*:

> Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

and that (Section 3):

> One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law shall be elected in each county by the electors of such county; * * *. Any judge of the court of common pleas may temporarily preside and hold court in any county; and * * * the chief justice of the supreme court of the state * * * may assign any judge to any county to hold court therein.

And that (Section 15):

> Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; * * *.

Ultimately, then, the allocation of judges in the respective counties of Ohio is left to the informed deliberation of the state legislature, as it should be, rather than with the inadequately informed discretion of the federal court. The problem of which the plaintiffs complain, and the difficulties inherent in its resolution, necessarily pose questions of a political nature which are not ripe for solution by the judicial process. The issues thus joined, therefore, are not justiciable.

While we recognize that a precise definition of that elusive term "political issue" is at best a semantic improbability and that the term is best described by example rather than by sweeping generalizations, there are enough consistently recurring characteristics to render the term definable. These are best summarized by Mr. Justice Brennan in *Baker v. Carr*, 369 U. S. 185, 217 (1962):

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Even a casual comparison between the allegations of the complaint before us and the criteria suggested by the Supreme Court indicates that we are presented with a "political question."

Plaintiffs do not suggest that we have the power to create any new judgeships and in that way expand the number of jurists sitting in heavily populated counties; the question, then, is whether each county is entitled to have its own judge or whether we must strike down that requirement and reassign judges from sparsely populated counties to the urban counties. We perceive of no judicially discoverable and manageable standards for resolving this issue. If a court of three judges were to be convened, we would require evidence from every county in Ohio relative to the volume of litigation[5] in that county and to the necessity of having a jurist available at each county seat. If we were to undertake an independent resolution of the questions posed by this complaint, we would necessarily express a lack of respect for the bona fide attempts by the Ohio Legislature to increase the number of judges in urban counties to alleviate docket congestion. (*Cf.* 131 Ohio Laws 165; 130 Ohio Laws 151; 128 Ohio Laws 147; 127 Ohio Laws 475; 126 Ohio Laws 778.) For these reasons it is the opinion of this Court that the attempted resolution of the political questions raised here would be an encroachment upon an area generally preserved for legislative determination.

As much as we abhor the judicial pursuit of questions essentially political in nature, we cannot abdicate our judi-

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[5] Delay in the process of litigation, which is the real evil complained of, is related to the volume and type of litigation in each court. The volume and character of litigation is not solely related to the population of each jurisdiction; therefore, population cannot be the sole determinative of the number of judges per county.

cial duty to redress grievances arising from violations of federal constitutional rights. Therefore, if the plaintiffs have accurately framed a cause of action based upon the Equal Protection Clause they are entitled to go forward, for the judicial standards by which we appraise such claims:

> * * * are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action. *Baker v. Carr,* 369 U. S. 186, 226 (1962).

In evaluating the alleged constitutional infirmity of state legislation, we are mindful that:

> No finicky or exact conformity is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert v. Cleary,* 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate. *McGowan v. Maryland,* 366 U. S. 420, 524 (1961). (Concurring Opinion, Frankfurter, J.)

It is apparent that the one judge per county rule, here under attack, is a product of Ohio's desire to have a court of general jurisdiction located conveniently within each county. Is this unreasonable? We think not. Convenience is an essential factor in arranging an effective judicial system, since it is often necessary for a judge to hear emergency measures, to-wit: motions for temporary re-

straining orders, applications for the writ of habeas corpus, applications for the issuance of search warrants and arrest warrants, and preliminary hearings and the fixing of bail in criminal matters. In short, it is not irrational to supply each county with a judge so situated therein as to be within the convenient reach of any potential litigant. We cannot say, then, that the Ohio constitutional guarantee that each county has its own judge suggests any departure from reason so as to bring that provision into conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In conclusion, we recognize that the plaintiffs have attempted to draw a close analogy to the legislative reapportionment cases, but they have failed to grasp the thrust of that line of authority. The first principle inherent in our republican form of government is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among the several districts within the political unit, then the voting strength of the individual citizens in these subdivisions is of unequal weight. It is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause. And there can be no reasonable justification for a system of apportionment which ignores the relative population of each political subdivision because "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds v. Sims,* 377 U. S. 533, 562 (1964). Thus the ratio which the population of each political subdivision bears to the population of the whole political unit has become, right or wrong, the sole criterion for judging

the equality of representation and voting strength for the individual citizens within each political subdivision.

But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system. The State constitutional provision requiring one judge per county bears a reasonable relation to the State's aim: a conveniently effective judicial system; the efforts heretofore by the legislature to increase the number of jurists in populous counties reflect no departure from reason. Therefore we see no constitutional basis for the plaintiffs' complaint. On the contrary, we recognize, as a matter of law, that the relative population of the counties of Ohio can not be, as the plaintiffs argue, the sole criterion of apportioning judges among the counties.

The plaintiffs' complaint, therefore, must be and is dismissed.

JAMES C. CONNELL,
Chief Judge.

Dated Feb. 2nd, 1966.

ORDER.

(Entered February 2, 1966.)

Upon consideration,

IT IS ORDERED that the plaintiffs' motion pursuant to 28 U. S. C. 2281 and 2284 requesting this District Court to assemble a three judge court for the determination of this case is overruled; further,

IT IS ORDERED that the defendants' motion to dismiss is granted; therefore,

IT IS ORDERED that the complaint is hereby dismissed at plaintiffs' costs.

JAMES C. CONNELL,
Chief Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1972~~ 115

NATHANIEL BUCHANAN, et al.,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, GOVERNOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE MOTION TO AFFIRM THE JUDGMENT OF DISTRICT COURT

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT OF DISTRICT COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1272

NATHANIEL BUCHANAN, etc., et al.,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, GOVERNOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE MOTION TO AFFIRM THE JUDGMENT OF DISTRICT COURT

Defendants-Appellees move this court, pursuant to Rule 16 (1), to dismiss this appeal as not within the jurisdiction of this court or in the alternative to affirm the judgment of the District Court because it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

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GERALD A. DONAHUE,
First Assistant,
Attorneys for Defendants-Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

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NATHANIEL BUCHANAN, et al.,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, GOVERNOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

This court has held that it has no jurisdiction on appeal from an order of a one-judge United States District Court overruling a motion to assemble a three-judge court pursuant to Title 28, Sections 2281 and 2284 U. S. Code. *Stratton v. St. Louis Southwestern R. Co.*, (1930), 282 U.S. 10, 15. It has been recently held by the United States Court of Appeals for the Second Circuit that an appeal lies to the Court of Appeals from the order of a single judge district court denying the motion for the assemblage of a three-judge court. *Bell v. Waterfront Commission of New York Harbor*, (2 Cir. 1960), 279 F. 2d 853 (opinion per Friendly, J.). The appeal, of course, is limited to the question of whether there is a substantial constitutional question. Cf. *Idlewild Bon Voyage Liquor Corporation v. Epstein*, (1962), 370 U.S. 713; *Bailey v. Patterson*, (1962), 369 U.S. 31.

Since there is now recognized a right to appeal to the Circuit Court of Appeals on this threshold question in Title 28, Section 2281, U.S. Code cases, there is no need for this Court to trouble itself with this initial question either by direct appeal or by issuing a writ of mandamus. Indeed, if *Stratton* is followed, this Court lacks jurisdiction on direct appeal and mandamus will not lie because there is a remedy by appeal. *Stratton v. St. Louis Southwestern R. Co., supra,* at 16.

Moreover, there are sound reasons why this Court should not take jurisdiction to review a district court order denying a motion to seat a three-judge court.

First, no doubt it would bring many frivolous claims to this Court (all of them thought frivolous by a district judge). Second, the Circuit Court of Appeals is closer to the situation giving rise to the cause and could probably give more complete and understanding treatment to the question in the inchoate posture it is bound to be in at this stage. Third, appellants should have but one avenue of appellate review, not two, both in fairness to appellees and in regard to the heavy burden the Federal Courts now have (such judicial burden seemingly of especial concern to appellants).

Therefore, appellees urge this Court to dismiss this appeal for want of jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1272

NATHANIEL BUCHANAN, et al.,
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Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT OF DISTRICT COURT

Opinion Below

The opinion of the United States District Court is reported at 249 F. Supp. 860 (N. D. Ohio E. D. 1966).

Question Presented

Did the United States District Court err in denying a motion to assemble a three-judge court because the claim for relief was patently without merit, where the relief sought was (among others) a declaration that Ohio's judicial structure is unconstitutional, and an injunction against the further operation of that judicial system, an order directing the Ohio Legislature to reapportion the Ohio Common Pleas Judges among the counties and an order directing the County Commissioners for Cuyahoga County to build a better court house which request for

relief was predicated on an alleged four-year docket delay in Cuyahoga County compared with lesser delays in other counties?

Argument

THE DISTRICT COURT WAS CORRECT IN NOT CONVENING A THREE-JUDGE COURT BECAUSE THE CONSTITUTIONAL ISSUE WAS WHOLLY UNSUBSTANTIAL IN THAT IT RAISED A NON-JUSTICIABLE "POLITICAL" QUESTION, AND MOREOVER, A QUESTION INVOLVING NO RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION AS HERETOFORE INTERPRETED BY ANY COURT IN THE UNITED STATES.

A. The request for relief is non-justiciable.

The standard of judiciability was stated by this Court in *Baker v. Carr,* (1962), 369 U.S. 186, 217, and quoted by the Court below:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment by various departments on one question."

It is appellees' contention that, marked by this standard, the issue presented and relief requested below, were so clearly not justiciable as to require no further debate or inquiry.

In the legislative reapportionment cases the standard was easily ascertainable: "one man-one vote." *Reynolds v. Sims*, (1964), 377 U.S. 533. That simple standard is followed by Ohio in the election of all its judges. Each elector of Cuyahoga county has one vote in the election of any of the Common Pleas Judges of Cuyahoga county. Since the Common Pleas Judges of Ohio do not assemble to vote *en masse* on judicial decisions nor do they legislate for all Ohio, there is no question of dilution of voting strength (in legislative reapportionment sense) in fixing the number of judges for the various counties in Ohio.[1]

Appellants assert that the standard here is just as simple, the implication being that the rate of litigation is a direct and sole function of population *and* that a judicial system works like a machine, so many judges handling a predictable and precise number of cases. The first implication ignores the realities of modern life and would, in fact, penalize the urban dweller. The differences in crime rates, divorce rates and commercial litigation (to name but a few) between urban and rural areas would go ignored.[2] More-

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[1] Appellant makes an effort to analogize apportionment of judges with legislators. But if the analogy were true in this case, what of county commissioners? Cuyahoga County has three for 1.6 millions and Vinton County three for 10,000? Or what about sheriffs, mayors, etc.?

[2] The present judicial system in Ohio recognizes these differences; for example, Cuyahoga county has six appellate judges, while Hamilton (Cincinnati), Butler, Clinton, Clermont and Warren counties have three appellate judges among them. Sections 2501.01 and 2501.012, Ohio Revised Code.

over, the differences in jurisdiction assigned various common pleas courts would go ignored.[3]

The second implication ignores the vagaries of having human judges and the differences various procedures and administrative practices can make. The Chief Justice of the United States made this point in a speech to the American Bar Association in 1958:[4]

"You all know the experience of New Jersey where, during the first year of operation under the new constitution, the courts disposed of almost twice as many cases as had been disposed of in the previous year. What you may not know is that—again—*this was done without adding any new judges,* but solely as the result of an improved procedure, improved judicial administration and last but not least, the inspired leadership of Chief Justice Arthur Vanderbilt." (Emphasis added)

Besides there being no judicably discoverable and manageable standard to resolve this issue, it is one that has been constitutionally committed to the Legislature for resolution. Constitution of Ohio Art. IV, Sections 1, 3, 4, 15. This same commitment of these issues to the legislative branch of government is found in the United States Constitution with reference to federal courts.

Furthermore, an interference here by the federal judiciary would ignore the many efforts made by past Ohio Legislatures to responsibly use their power in shaping the Ohio judicial system (131 Ohio Laws, 165; 130 Ohio Laws,

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[3] For example, the Franklin County Common Pleas Court has appellate jurisdiction over many administrative agencies and boards located in Columbus. E.g. Section 4301.31, Ohio Revised Code.

[4] Warren, *The Problem of Delay: A Task for Bench and Bar Alike,* 44 A. B. A. J., 1043 at 1045.

634; 128 Ohio Laws, 147; 127 Ohio Laws, 475; 126 Ohio Laws, 778).

In addition to increasing the number of judges, the Legislature has broadened the jurisdiction of the Cleveland Municipal Court (county-wide jurisdiction) thus reducing the load on the common pleas court.[5] The amount common pleas judges are paid [6] varies from county to county reflecting the fact that judges in the larger counties are expected to carry a fuller load than those in smaller counties.

These statutes all reflect the legislative concern with and various efforts made to improve the Ohio judicial system. This is a legislative problem and the Legislature has been meeting that problem. Now pursuant, to *Nolan v Rhodes*, 378 U.S. 556 (1964), the next Ohio Legislature will be constitutionally apportioned. Perhaps it will be even more responsive to the needs of the urban areas. Certainly that was this Court's hope. The fact that legislatures are so important to (actually essential for) solving complex political problems like the one appellants would have the federal courts solve, no doubt pursuaded this Court to break the self-perpetuating cycle of malapportionment in state legislatures, despite the many difficulties that such an excursion into the political realm would meet with. See *Reynolds v. Sims, supra* at 566.

In the legislative cases, the remedy was necessary and the standard easily ascertained from the Constitution itself. In this case, the remedy is unnecessary and the standard impossible to find by any judicial method of discovery.

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[5] Section 1901.17, Revised Code of Ohio (1965). The limit in Cuyahoga county is $10,000, in Franklin (Columbus) and Hamilton counties $7,500, in several others $5,000 and the rest $3,000.

[6] Section 141.05, Ohio Revised Code (1959).

B. Appellants have not stated a cause of action involving any rights protected by the equal protection or due process clauses of the Fourteenth Amendment of the United States Constitution.

The equal protection clause certainly does not demand that all laws have an equal effect on all people. It only protects against irrational classification and invidious discrimination. As the court below pointed out, the Ohio constitutional requirement of at least one judge per county is not irrational. Moreover, it in no way limits the number of judges other counties may have.

Would the fact that the "law's delay" might be more pronounced in Cuyahoga county than in Vinton county, reflect a policy of "invidious discrimination" by the state Legislature against all the people of Cuyahoga county? If so, perhaps a comparatively crowded county jail or crowded freeways or other conditions of congestion reflect invidious discrimination giving rise to a judicial remedy. These are all legislative problems. The most a court can do is see that the Legislature accurately reflects the population. This, this Court has done.

Appellants complain that "justice delayed is justice denied" (a statement as they quote it of Gladstone, significantly a politician not a judge), and that justice delayed is therefore a violation of the due process clause of the Fourteenth Amendment. But no property right is lost. Any damage award in a civil suit comes augmented by the legal interest rate (6%) from the date the damage occurred. Discovery in Ohio, includes the taking of depositions for the preservation of evidence. Furthermore, as the court below pointed out, if delay will actually prejudice a particular case, the Common Pleas Court rules provide for

an advancement on the docket (Common Pleas Court Rule 16). None of appellants alleged how his particular cause would be prejudiced.

None of the cases cited by appellants are like this one. All of the state cases were interpreting a specific state constitutional right to "trial without delay." In none of them, of course, was the Court asked to fashion a remedy like appellants request here.

Conclusion

The problem of delay is a task for bench and bar and legislatures: for the bench, per "bench," but not as a court fashioning a new remedy—enjoining the Legislature to give him more brothers of the bench. Appellants have a vexing grief but it is not a deprival of equal protection of the law nor of due process and in any event, they have chosen the wrong forum. They must go to the newly reapportioned Legislature.

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APPENDIX

Rules of the Court of Common Pleas of Cuyahoga County, Ohio

Rule 16. Advancing of Cases

(a) No case shall be advanced for pre-trial or trial out of its regular order except upon order of the Chief Justice upon motion or upon recommendation of one of the Judges for good cause shown, except that the Judge sitting in Room One and any pre-trial Judge may in his discretion advance a case before him for trial on the merits. No case shall be sent to a Civil trial room for assessment of damages on default, unless and until notice shall have been given to all counsel concerned either by publication in the Daily Legal News or otherwise as directed by the Court.

(b) On Monday of each week the Assignment Commissioner shall prepare and deliver to the Chief Justice a complete list of cases at issue which involves recovery upon forfeited bail bonds. Such cases shall be advanced for immediate trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ~~1272~~ 115

NATHANIEL BUCHANAN, *etc., et al.*,
Plaintiffs-Appellants,

v.

THE HONORABLE JAMES A. RHODES, *etc., et al.*,
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANTS-APPELLEES TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.
No. 1272.

NATHANIEL BUCHANAN, *etc., et al.,*
Plaintiffs-Appellants,

v.

THE HONORABLE JAMES A. RHODES, *etc., et al.,*
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANTS-APPELLEES TO DISMISS OR AFFIRM.

THE MOTION TO DISMISS.

As we pointed out in our Jurisdictional Statement, the review sought by this appeal is supplemented by a request for leave to file a mandamus petition. Both procedures seek the same relief, *viz,* a directive that a three-judge court be convened. Citing *Stratton v. St. Louis Southwestern R. R.,* 282 U. S. 10 (1930), appellees insist that the appropriate remedy is the mandamus action rather than an appeal. Since both procedures are now pending before this Court, it might seem academic to inquire which is the appropriate remedy.

However, we respectively submit that the appropriate remedy in this case is the appeal presented here. We make that statement despite the following language in the *Stratton* decision (282 U. S. 10, at 15-16):

> "Fourth, if a single judge, thus acting without jurisdiction, undertakes to enter an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court,

> as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirements. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single Judge and an appeal to the Circuit Court of Appeals for the decree by three judges and a direct appeal to this court.
>
> "Accordingly, where a court of three judges should have been convened, and was not, this court may issue a Writ of Mandamus to vacate the order or decree entered by the District Judge and directing him or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction."

While this language would seem to be clear and dispositive, we submit that it is no longer applicable to a direct appeal in these circumstances. The decision in the *Stratton* case construes the language of the old Judicial Code, Section 266 (act of March 3, 1911, Chapter 231, Section 266, as amended by 37 Stat. 1013 (1913), and 43 Stat. 938 (1925)). That section appears at 28 U. S. C. (1940 ed.), Section 380. Unlike the replacement section in the present code, that former code provision describes in a single section, (a) the requirements for a three-judge court in an action to enjoin enforcement of a state statute on federal constitutional grounds, (b) the procedure for the creation of such a court, (c) the special rules applicable to the determinations of such a court, and (d) the available appeal from such a court. The language relating to direct review by this Court is extracted from this lengthy code section as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction *in such case* * * *. The requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction *in such suit*" (emphasis added).

This language was open to the construction that a direct appeal was available only in cases which were in fact heard by a three-judge court. That interpretation would exclude a direct appeal in cases where a three-judge court was required by law but was in fact not convened. The *Stratton* case interpreted that language in that manner.

However, a significant change in language was made by the 1948 revision of the Judicial Code. The sections requiring a three-judge district court for different purposes were reorganized and revised with an apparent purpose of making them more uniform in application. A new section was created to deal with the right of direct review to this Court in all three-judge district court situations. Thus, 28 U. S. C., Section 1253 now provides:

> "* * * any party may appeal to the Supreme Court from an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges*" (emphasis added).

We submit that the language of the present code is not open to the same construction which this Court gave to the predecessor section in the *Stratton* case. A direct appeal is now appropriate where any act of Congress *required* the convening of a three-judge court, whether or not such a court was in fact convened.

We submit further, that this change in procedure is salutary for judicial administration. The rule in the *Stratton* case seemingly precluded the federal courts of appeal from any review. It permitted review of a district judge's refusal to convene a three-judge court only by the somewhat cumbersome procedure of an extraordinary mandamus writ in this Court. Some attempt was made to alleviate this situation by this Court's decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U. S. 71 (1962). In that decision, this Court noted that the court of appeals had found that a three-judge court should have been assembled, but considered itself powerless to order any remedy in light of the *Stratton* decision. This Court said at 370 U. S. 716:

> "Stratton does not stand for the broad proposition that a Court of Appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled."

Attempting to apply that rule, the federal courts of appeals find themselves in a position of rendering advisory opinions with an expressed hope that the district court would remedy its errors—but without any power to order a correction. E.g. *Szejkovski v. Tamm,* 326 F. 2d 657 (D. C. Cir. 1963); *Reed Enterprises v. Corcoran,* 354 F. 2d 519 (D. C. Cir. 1965). The use of such advisory opinions without binding effect is certainly not the best method for judicial review.

For the above reasons, we submit that the threshold determination of whether a three-judge district court was

required should be made by this Court under the present language of 28 U. S. C., Section 1253. If the convening of a three-judge district court was *not required*, there is no right of appeal to this Court; if a three-judge court *was required*, review is expressly provided by the present statutory language. We have been unable to find any decision by this Court since the 1948 codification which construes the new language in these circumstances. The only language which would seem to relate to the right of review by this Court of the determination whether a three-judge court was required, is that which appears in *Bailey v. Patterson*, 369 U. S. 31 (1962). In the *Bailey* case, this Court determined that the case was not one which required a three-judge court and was, therefore, not one in which a direct appeal was proper. The court added at 369 U. S. 34:

> "However, we have jurisdiction *to determine the authority of the court below* or to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes" (emphasis added).

For the above reasons, we urge that this Court utilize the appeal remedy rather than the extraordinary mandamus remedy, which is likewise being invoked as an alternative protection for the rights of these appellants.

THE MOTION TO AFFIRM.

The second branch of the motion by Defendants-Appellees seeks to deny that there was any requirement for a three-judge court in this case. They assert, in substance, that there is no real constitutional issue presented by the Amended Complaint. The single-judge district court apparently assumed that the standard for determining whether to convene a three-judge court was the same as

the standard used to decide the case on its merits. By contrast, this Court said in *Zemel v. Rusk,* 381 U. S. 1, at 6 (1935):

> "Although we do not accept Appellant's argument, infra pp. 17-18, we cannot agree that it is so insubstantial as to compel a District Court to read it out of the complaint and to refuse to convene a three-judge court."

We submit that the constitutional controversy presented by the complaint here is far too grave "to compel a District Court to read it out of the complaint and to refuse to convene a three-judge court."

Appellees' arguments deal principally with the equal protection considerations raised in our Jurisdictional Statement, and largely ignore or by-pass the important due process elements discussed at greater length in the Jurisdictional Statement. With respect to the due process violations described, appellees argue that there is no real showing of a loss of property rights. That contention is based on the theories that (a) judgments in civil damage actions are supplemented by interest at six percent (6%) from the date of the damage suffered, (b) discovery depositions are available to preserve evidence, and (c) a motion to advance a case out of order is available in the Common Pleas Court to avoid special prejudice. We have some difficulty in responding to the first of these three theories since *its premise is undisputably, unmistakeably, and unequivocally wrong.* The law of Ohio is absolutely clear that interest on an unliquidated damage claim runs only from the time of the judgment. Ohio Rev. Code, Section 1343.03; *State Automobile Ins. Co. v. Kaffenberger,* 84 Ohio App. 304, 83 N. E. 2nd 916 (1948); *Coulter v. General Fire Proofing Co.,* 67 Ohio App. 71, 35 N. E. 2d 1003 (1941).

Since the aggrieved party receives no compensation whatever for his delay in obtaining damages, the loss of interest during the four year docket delay, is another form of property loss caused by the denial of due process in failing to afford a timely hearing.

Second, despite appellee's reliance upon the discovery procedures available in Ohio, one can hardly hope to substitute these methods to preserve evidence for a trial itself. At best, the use of interrogatories and depositions can preserve a small segment of the evidence which will be presented in a full trial. If other witnesses who are not deposed become unavailable with the passage of time, the property rights involved in the action or defense of the claim have been forever lost. Indeed, even those witnesses whose testimony has been the subject of a deposition, have a tendency to recall circumstances differently as time progresses, so that a prolonged passage of time is a further impairment of those property rights.

Finally, the availability of a motion to advance a case out of order is essentially no comfort to the overwhelming multitude of litigants, and should be no comfort to appellees in denying the very real loss of property rights. A motion to advance is granted only in extraordinary circumstances, usually where one of the litigants is unlikely to survive the docket delay by reason of his age or physical infirmities. As counsel for appellees must fully appreciate, such motions are granted only on rare occasions. If the situation were otherwise, complete chaos would result in the trial court when preferences were extended to specific litigants without extraordinary justification. Further, whenever one case is advanced for hearing, another is necessarily delayed by the time of the hearing in that first case. Obviously, a trial court could not grant every liti-

gant's request to advance his case in front of every other litigant. Therefore, the rare occasion on which a motion to advance is allowed has no effect whatever on the average docket delay for the average litigant.

The bulk of defendants' motion to affirm deals with equal protection considerations. They argue that there is no clear judicially available standard to provide more nearly equal protection, since factors other than the number of judges will affect the length of the docket delay. At the same time, defendants are presenting the somewhat anomalous argument that metropolitan areas (which have fewer judges per capita) have greater need for more judges per capita because of higher urban crime rates and commercial litigation. This would seem to be an ample demonstration that the allocation of judgeships in Ohio is indeed an invidious discrimination without reasonable or justifiable support since the areas which have a lower per capita allotment of judgeships have need for a greater per capita allotment of judgeships than the others. The remedy sought by this action is not unlike that provided by the Constitution of Florida and other states which guarantee each county a judge for a stipulated number of citizens. (In the case of Florida, one judge for each 50,000 persons or any major fraction thereof.)

Next, appellees seek to draw a parallel between the allocation of judgeships within Ohio and the allocation of judgeships in the federal system. We submit that this parallel has no greater constitutional meaning here than when it was attempted in the legislative reapportionment cases. The Federal Constitution expressly delegates the creation, form, and location of the Federal Courts inferior to this Court, to the Federal Congress. *U. S. Constitution*, Article III, Sec. 1. The states are obliged to comply with the requirements of the Fourteenth Amendment which

guarantees equal protection and due process to all citizens, without any delegation of authority to allocate courts.

We note that appellees make no comment whatever about the denial of due process and/or equal protection which results from a systematic reassignment to the Cleveland area court of judges who are elected by citizens from other parts of the State. They make no comment about the direct conflict between the decision below and that of the District Court for the Eastern District of New York, which has convened a three-judge district court on litigation involving this very subject. They do not question the fact that there is a great disproportion in the allocation of judgeships among the Ohio counties from a population viewpoint. They do not deny that additional judgeships is at least one method of alleviating unconscionable docket delays. Instead, appellees repeat the refrain that appellants should seek their redress in the Ohio Legislature. We would ask the Court to remember that the Ohio Legislature has repeatedly rejected proposed legislation to give any real relief to the urban judicial docket, and that the conceivable availability of legislative relief has no constitutional significance beyond the formulation of an appropriate remedy after appellants' rights are declared by the courts. See *Lucas v. General Assembly of Colorado*, 377 U. S. 713 at 736-37 (1964).

CONCLUSION.

We respectfully submit that the motions by defendants-appellees to dismiss or affirm should be denied. We again ask this Court to accept jurisdiction of this matter to establish plaintiffs' right to a hearing on the merits before a three-judge district court. Legislatures in metropolitan states have generally failed in their obligation to

provide a judicial remedy. If the courts fail to insist upon the availability of such a remedy, public confidence cannot be long maintained.

Respectfully submitted,

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END